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Legislative Bulletin.....October 3, 2007

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H.R.2740 — MEJA Expansion and Enforcement Act of 2007

Summary of the Bill Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: \$23 million over FY2008-2012

Effect on Revenue: Not significant (according to CBO)

Total Change in Mandatory Spending: \$0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: 0

Number of Bills Without Committee Reports: 0

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

H.R. 2740 — MEJA Expansion and Enforcement Act of 2007 (*Price, D-NC*)

Order of Business: The bill is scheduled to be considered on Wednesday, October 3, under a structured rule making three amendments in order.

Summary: H.R. 2740 expands the Military Extraterritorial Jurisdiction Act (MEJA, P.L. 106-523) to allow for the criminal prosecution of *all* federal contractors who are serving in or near an area where the Department of Defense (DOD) is conducting a “contingency operation” and would require that the Federal Bureau of Investigation (FBI) establish investigative units overseas in areas where contractors are operating. Currently, certain government employees or contractors (e.g. State Department contractor Blackwater USA) are not covered under MEJA law.

The bill intends to address and cover (among others) the prosecution of security contractors in circumstances where they may have committed crimes overseas in DOD contingency operation areas.

In addition, H.R. 2740 would expand prosecution coverage to specifically include Blackwater and any federal contractor who is operating under any U.S. agency or department in a defined geographic area in or near a contingency operation.

H.R. 2740 would also require that the Department of Justice Inspector General report to Congress on the status of DOJ alleged violation investigations that have been committed by contract personal. The report is required to include:

- The description and status of DOJ investigations of alleged violations;
- The number of complaints received by the DOJ;
- The number of investigations into complaints opened by the DOJ;
- The number of criminal cases opened by the DOJ;
- The number and result of criminal cases closed by the DOJ; and
- Findings and recommendations about the number of criminal cases prosecuted by the DOJ.

Section 3 of H.R. 2740 outlines the new requirements for the FBI investigative units for contingency operations (Theater Investigative Units). H.R. 2740 requires that well-staffed Theater Investigative Units are maintained in or around contingency operation areas overseas to investigate incidents involving contract personnel. Duties of such FBI investigative units are to:

- Investigate reports that raise reasonable suspicion of criminal misconduct;
- Investigate reports of fatalities resulting from the use of force (see amendment offered by Conyers, Price, and Scott); and
- Refer the case to the U.S. Attorney General for further action to be taken.

No additional funding is supplied to the FBI to carry out the establishment and maintenance of Theater Investigative Units.

In addition, H.R. 2740 requires that other federal agencies operating in an area determined to be a contingency operation area by the DOD cooperate with and support FBI Theater Investigative Units during any investigation into contract personnel cases.

Background: The Military Extraterritorial Jurisdiction Act was initially intended to cover the criminal prosecution, under U.S. federal law, of military personnel, their family members, and/or civilian contractors engaging in or supporting DOD missions overseas. Originally enacted prior to September 11, 2001, some changes were arguably needed to address our evolving presence overseas in Iraq and elsewhere. In 2005, MEJA was extended to include coverage for any contractor who does not report directly to the DOD but who is working toward, or in support of,

a DOD mission overseas. Additionally, current law states that contractors who commit crimes on federal property are subject to prosecution under the USA PATRIOT Act.

One of the most well-known and utilized security contractors currently serving the State Department overseas in Iraq is the security firm Blackwater USA. According to their website, “We [Blackwater] are not simply a ‘private security company.’ We are a professional military, law enforcement, security, peacekeeping, and stability operations firm who provides turnkey solutions. We assist with the development of national and global security policies and military transformation plans.” Blackwater security forces are currently operating in Iraq (as well as other overseas installations) to serve the State Department in several capacities, including serving as protection forces for U.S. Embassy officials, military transport security, and reconstruction workers.

On September 16, 2007, under the direction and employment of the State Department, Blackwater security forces were escorting a U.S. Embassy convoy through a square in the Masour District of Baghdad. According to Blackwater personnel, gunmen attacked the convoy to which Blackwater forces responded within their rules of engagement by firing back. Eleven Iraqi citizens were killed during the exchange. Under current MEJA law, Blackwater security forces can only be prosecuted if it is established that while protecting State Department officials, Blackwater security forces were supporting the greater DOD mission in Iraq. Both the State Department and the Iraqi government are in the preliminary stages of conducting independent investigations into the events of September 16, 2007 and **no definitive conclusions have been drawn**. This incident was the subject of a recent Government Oversight and Reform Committee hearing.

According to testimony given before the House Judiciary Committee, Special Inspector General for Iraq Reconstruction, Stuart W. Bowen, Jr., said “the incidence of corruption within the U.S. reconstruction program—judging from those cases that we have uncovered thus far—appears to constitute a relatively small component of the overall American financial contribution to Iraq’s reconstruction.”¹

Amendments made in order:

Each amendment is debatable for 10 minutes.

Conyers (D-MI)/Price (D-NC)/Scott (D-VA). Manager’s Amendment. Inserts the term “*potentially unlawful*” before “use of force”. Clarifies that the FBI should investigate fatalities resulting from the “*potentially unlawful*” use of force. Allows the Attorney General to request assistance from other federal agencies when staffing and providing resources to the FBI Theater Investigative Units. Mandates that the FBI request security assistance from the Secretary of Defense when the FBI units need additional security.

¹ Statement of Stuart W. Bowen Jr., Special Inspector General for Iraq Reconstruction, before the United States House of Representatives Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, Washington, DC, “War Profiteering and Other Contractor Crimes Committed Overseas”, Tuesday, June 19, 2007; <http://judiciary.house.gov/OversightTestimony.aspx?ID=986>

Schakowsky (D-IL). Requires a new report from the DOJ regarding contracts being carried out in Iraq and Afghanistan specifically and requires that the report contain the following information regarding contracts in Iraq and Afghanistan:

- any charges brought against contractors and their employees;
- a list of all criminal investigations and reports made in cases where no criminal charges were brought; and
- descriptions of the legal actions taken by the U.S. government against contractors and their employees as a result of a criminal charge, investigation or complaint.

Hill (D-IN). Would require the Director of the FBI to submit an annual report to Congress regarding progress in the Theater Investigative Units, including:

- the number of reports received on criminal misconduct by contractors;
- the number of reports received on fatalities caused by contract personnel;
- the number of cases referred to the Attorney General; and
- statutory changes necessary for the Director to carry out the duties entailed by this bill.

Committee Action: On July 16, 2007, the bill was referred to the Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security, which marked up the bill and ordered it reported to full committee by voice vote. On August 2, the Judiciary Committee marked up H.R. 2740, and ordered it reported, as amended, to the full House by a voice vote.

Possible Conservative Concerns: H.R. 2740 requires that the FBI establish and maintain new investigative units (Theater Investigative Units) in every “theater of operation”, a term which this bill does not define and does not afford additional funding for. This may place a potentially large burden on the FBI both fiscally and logistically.

While some conservatives may not have concerns with the actual provisions included in H.R. 2740—expanding the same criminal liability to State Department contractors that already apply to DOD contractors—some may take issue with a perceived motivation for this legislation—to ultimately hamper private contracting efforts in Iraq and elsewhere. By some estimates, there are roughly 200,000 private contractors working in Iraq to protect diplomats and reconstruction workers. This is important work that, in the absence of private contractors, would be undertaken, in many cases, by U.S. troops, either diverting them away from other, more pressing missions or driving up the overall size of the U.S. presence in Iraq.

Administration Position: Not available at press time.

Cost to Taxpayers: CBO estimates that implementing H.R. 2740 would cost \$23 million over the FY2008-2012 period, assuming appropriation of the necessary amounts. Enacting the bill could affect direct spending and revenues, but such estimates would not be significant.

Does the Bill Expand the Size and Scope of the Federal Government?: Yes, the bill would create FBI Theater Investigative Units.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: The Judiciary Committee, in House Report 110-352 asserts that, “In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2740 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.”

Constitutional Authority: The Judiciary Committee, in House Report 110-352, cites constitutional authority in Article I, Section 8, Clauses 10, 14, 16, and 18 (Clause 10 states that Congress has the power to define and punish felonies at sea and against the Law of Nations; Clause 14 states that Congress has the power to make rules for the government and regulation of the land and naval forces; Clause 16 states that the Congress has the power to provide for the organization, arming, and disciplining of the militia; and Clause 18 states that Congress has the power to make all laws which are necessary and proper for carrying into execution all powers vested by the Constitution).

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